Supreme Court, U.S.
FILED

9 42038 JUN 13 1995

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM FLEMING,
Petitioner,

VS.

GREATER ST. LOUIS AREA MAJOR CASE SQUAD; CITY OF DELLWOOD, MISSOURI; CITY OF JENNINGS, MISSOURI; CITY OF FLORISSANT, MISSOURI; DAN CHAPMAN; ROBERT LOWERY; HARRY SLATEN; MICHAEL YARBOROUGH; and DENNIS CORDIA,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Should the Supreme Court review the summary judgment procedure by which this claim of police misconduct was dismissed without trial:

1. Because the district court is required to accept yet refused to allow or consider the counteraffidavits contemplated by Civil Rule 56 prior to a grant of summary judgment on a "good faith" defense to false arrest; and

2. Because the Court of Appeals should require that the district court rule upon the merits of petitioner's §1985-based claim of false arrest before a grant of summary judgment; where the motions and arguments the court upheld neither challenged the claim of conspiracy nor requested judgment thereon.

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JURISDICTIONAL STATEMENT

This civil action for damages for false arrest was dismissed in the district court on March 15, 1994 in an order sustaining the defendants' motions for summary judgment. On appeal, pursuant to 28 U.S.C. §1291, the Eighth Circuit Court of Appeals sustained the ruling of the trial court on February 14, 1995 and denied rehearing on March 16, 1995. District Court jurisdiction is based upon 28 U.S.C. §§1331, 1343, and upon 42 U.S.C. 1983,

1985 and 1988. The Supreme Court has jurisdiction to review a final judgment of the Court of Appeals, 28 U.S.C. 1254(1).

The orders of the District Court were rendered by the Honorable Stephen N. Limbaugh and are not reported. The opinion of the Eighth Circuit Court of Appeals is unpublished.

STATEMENT OF THE CASE

William Fleming, a black man wrongfully indicted for the murder of a white police officer, was imprisoned for more than seven months during 1987. Upon his release and after two other men were convicted of the murder, Fleming filed a complaint in the District Court of Eastern Missouri to redress his wrongful incarceration. The Court of Appeals for the Eighth Circuit affirmed the district court's grant of summary judgment on behalf of defendants - the police authorities who brought about his arrest .

Fleming now seeks the general superintendency of this Court to review and correct the procedure by which his claim under 42 U.S.C. §1983 was rejected in the trial court which relied upon affidavits to which he was not allowed to respond, and without consideration by either court of his claim of conspiracy by the defendants under 42 U.S.C. 1985.

REASONS FOR GRANTING THE WRIT

STATEMENT OF FACTS

The suburban St. Louis, Missouri cities of Jennings, Florissant and Dellwood are among several dozen municipalities which have formed a voluntary regional police department designed to bring large-scale law enforcement resources to problems outside the range of the capabilities of the individual communities. Known locally as the Major Case Squad, the ad-hoc group was initiated to solve the highly-publicized murder in February, 1987 of Kenneth Koeller, a sergeant of police in the City of Jennings, Missouri. From a posture of scant evidence and with no actual eyewitnesses to the crime, the squad commenced an area-wide manhunt - a veritable dragnet - in which William Fleming was wrongfully ensnared. The defendants in the civil lawsuit are police authorities and their municipal masters who participated in his arrest and imprisonment.

The spectre of racial mathematics in this historically racially-polarized region arose almost immediately as the manhunt focused upon the black community. Among more than 100 potential culprits interviewed by the force, scarcely three were non-black even though at least one adult white male confessed that he was in the area and witnessed the shooting. Apparently convinced without rational basis that a black man was guilty, the squad directed its efforts to the pursuit of Fleming's arrest, indictment and incarceration without bail for more than seven months.

Two men with no connection to Fleming were eventually apprehended and prosecuted successfully for the policeman's murder and this action was thereupon filed in the district court. It is asserted in Count I that the members of the squad pursued the prosecution with full knowledge that Fleming was innocent, intending to mollify an inflamed community until the real murderer could be found. Count II alleges a conspiracy among the individual defendants to accomplish that purpose.

The defendants' summary judgment motions were adopted by the trial court on grounds of qualified immunity and, in the words of the court, because the individual defendants were not "sufficiently personally involved" to be liable for Fleming's arrest. But the court could not conclude the analysis on the basis of the affidavits and counter-affidavits initially presented since Fleming's claim of lack of probable cause had not been addressed. The court suggested, *sua sponte*, that the affidavit of Dan Chapman, the overall supervisor of the squad, be "supplemented" with additional materials to demonstrate the defendants' good faith. On the strength of the predictably self-serving rumor, hearsay, and "tips" thereupon supplied, the district court disposed of the question of probable cause and dismissed the remaining defendants from the case. Fleming was not allowed to respond or to demonstrate the falsity of the supplemental materials.[1]

On appeal Fleming challenged the dismissal on nine independent bases including the extra-territorial application of "qualified immunity" for actions outside the MCS officers' home jurisdictions, and the dismissal of the §1985 conspiracy claim with no consideration of its merits and without challenge by the defendants. Most important of course, and most serious was the failure to allow Fleming to respond to or to challenge the authenticity of the supplemental affidavits submitted by the defendants.

In its opinion (Appendix p. A-6) the Court of Appeals adopted the supplemental affidavits, ignored the procedural anomaly inherent in the radical application of Civil Rule 56, and simply refused to address the same issue that the district court did not address - that the §1985 conspiracy claim was unchallenged and should not have been dismissed.

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[1] Local Rule 7(B)2 of the Eastern District (Appendix A-25) allows 20 days to file counter-affidavits. The district court entered its ruling after only 14 days had elapsed.

It is clear that the 8th Circuit was aware of the use by the district court of the truncated summary judgment procedure. And it cannot be seriously doubted that the appellate court knew that the district court both accepted and relied upon the unchallenged supplemental allegations in reaching the conclusion that the complaint should be dismissed. These matters were fully briefed and addressed in Fleming's motion for rehearing. [2] Both courts realized that he was denied the privilege ordinarily accorded by the Federal Rules to challenge the authenticity of the self-serving rumors, exaggerations and downright lies offered to justify the heavy handed actions of this regional police force.[3] By failing to recognize or acknowledge the procedural oddity, the court of appeals simply adopted without comment the ad-hoc supplementation of the defendants' affidavits while ignoring the evisceration of the plan for fairness set out in Rule 56.

Probable Cause is a Jury Question

The existence of probable cause to arrest is, in the first place, a question for a jury and depends upon an assessment whether the facts and circumstances would warrant a reasonable belief that the arrestee was involved in the crime. *Dunaway v. New York*, 442 U.S. 200, 208, n. 8, 99 S.Ct. 2248, 2254, n. 8, 60 L.Ed.2d 824 (1979). In previous cases the 8th Circuit has held that a §1983 action is an appropriate forum in which to evaluate the existence of probable cause and that the question of a police officer's good faith is for a jury. In *Lovejoy v. Goodrich*, (8th Cir. 1986), 798 F2d 1201, the 8th Circuit held that prior police conduct is relevant and admissible for jury consideration on the issue whether a subsequent arrest is made in good faith or amounts to continuing police harassment. Fleming's counter affidavits suggesting a pattern of previous racially-based abuse by these

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[2] Motion for Rehearing p. Appendix p. A-20.

[3] The Major Case Squad has no corporate status. The individual officers must be made defendants along with their sponsoring municipalities.

municipalities, if accepted as true for summary judgment purposes, should have preserved the factual issue of these officers' "good faith" for determination by a jury.

Fleming produced substantial circumstantial evidence that the officers lacked a "good faith" belief that there was probable cause to arrest him.

Throughout the unpublished opinion the court of appeals adopted a terminology of description that unfairly characterizes Fleming's proffer of proof as "vague and conclusory" while minimizing the defendants' involvement as "minor participation".[4] The commentary upon the evidence was improper in the order of the district court. It is no more defensible for the court of appeals to suggest that the history, the context, and the racial mathematics - the circumstantial evidence - could not constitute an offer of "real evidence" of lack of good faith on the part of the police officers. That the investigation assumed immediately an unwarranted focus in the black community is not a "vague" notion. It is a fact contained in and derived by simple arithmetic from the documentary record of the investigation which was presented to the district court without challenge. It is, furthermore, an unchallenged fact that at least one Caucasian citizen was spared the personal embarrassment, humiliation and risk of arrest even though he admitted being present at the time and within the area of the commission of the crime.

Contrary to the suggestion by the court, these evidentiary elements offered by Fleming are not based upon "hearsay". They form an authentic record of the events from which a finding of racial animus on the part of the police is clearly reasonable. They are relevant, if sordid, details of this regrettable affair that can establish for a jury the malignant intent to vent the legitimate frustration of the community upon innocent black persons with

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[4] See Opinion of 8th Circuit (Appendix p. A-4, lines 1, 25.)

no articulable connection to the murder. The Supreme Court has affirmed that evidence need not be presented in a format that would be admissible at trial in order to survive summary judgment. Fleming was not required to "depose his own witnesses". *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The suggestions by the court that only direct, first-person or testimonial evidence is competent to meet Fleming's counter-affidavit burden is simply incorrect. The correct rule is that circumstantial and testimonial evidence are equivalent. The background of regional race relations and the refusal to consider the possibility that a white man was guilty are circumstances that should have been reserved for evaluation by a jury. *Adickes v. S. H. Kress and Company,* 398 U.S. 144, 158, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970).

The Grand Jury indictment does not foreclose the issue of the defendants' "good faith" belief that they possessed probable cause to arrest Fleming.

It is the essential point of this lawsuit that Fleming's arrest was without probable cause and that the grand jury process was subverted by the defendants with the acquiescence of the prosecuting authorities. On this issue the court of appeals suggests simply that:

> [T]he grand jury indictment serves to break a chain of causation between an alleged false arrest and a violation of constitutional rights.
>
> Opinion of 8th Circuit (Appendix p. A-6)

This court has ruled otherwise. In *Malley v. Briggs,* 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) the Supreme Court affirmed that a person falsely accused by an overzealous constabulary has a right to question whether the officer involved had reason to doubt the veracity of the evidentiary base underlying

the conclusion that probable cause existed - "despite the magistrate's authorization". 475 U.S. at 345, 89 L.Ed.2d 281, 106 S.Ct. 1098.

Once the district court even hinted at a basis to question the existence of probable cause for Fleming's arrest it should have been bound to allow and to demand equal augmentation of the proofs. Once the defendant police agencies were given a second chance to compose and present their recollection of past events so, also, should Fleming's readily available proofs to the contrary have been made part of the record of this reign of terror. No authority exists in support of the radical departure from the even-handed design of Rule 56.

The Court of Appeals has sanctioned the summary dismissal of Fleming's separate allegation of conspiracy under §1985 without consideration of the merits of the claim.

The Court of Appeals has admitted that Fleming's request for review is in nine parts.[5] However its ruling consists of little more than a capsulization and recapitulation of the district court's conclusion that the involvement of the police officers amounted to "nothing further to do with the investigation" and "minimal involvement". These judgments of the quality of the evidence are subjective, opinion-driven, factual determinations appropriate for consideration by a jury and inappropriate for review by an appellate court. In an opinion substantially devoted to these factual disputes, a serious discussion of the remaining issues upon which Fleming's appeal was bottomed goes wanting. Neither court suggests a rationale to square the conclusion that Fleming's evidence is insufficient with the rule enunciated by this Court that summary judgment is not a proper time for a district court to substitute its view of the *weight* of the evidence:

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[5] See Opinion of 8th Circuit (Appendix p. A-3)

> "The judge's function is not himself to weigh the evidence and determine the truth of the matter." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

Summary judgment is particularly ill-suited to resolve questions in which intent, good faith and other subjective feelings play dominant roles. *Freeman v. Blair*, 793 F2d 166, 171 (8th Cir. 1986).

The issue of central import in this appeal remains the failure by the appellate court even to comment upon the almost flippant manner in which Fleming's separate §1985 claim was considered and dismissed. Count II was directed to the possibility that the individual defendants might escape liability under §1983 by claiming that their separate actions were insufficient to render any one of them liable for the harm that has resulted. This is precisely the scenario for which §1985 was designed - to assure that those whose plan relies upon teamwork will not escape liability for an illegal purpose successfully achieved.[6]

Viewed through the transforming prism of a conspiracy, the simple analytical protocol of "personal" involvement, or "direct" responsibility, arguably appropriate under §1983, is plainly insufficient. This court has said that "Individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it". *Bourjaily v. U.S.*, 483 U.S. 171, 181, 107 S.Ct. 2775, 2781, 97 L.Ed.2d 144 (1987). The sum of an evidentiary presentation may well be greater than its constituent parts. *Id.* 107 S.Ct. at 2781.

Refusing even to consider the "concerted action" theory the Court treated the §1985 claim as congruent with § 1983 and subject to dismissal also.

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[6] A claim under §1985 is not subject to the qualified immunity defense for public officials. See: *Burrell v. Board of Trustees of Georgia Military College*, (11th Cir. 1992) 970 F2d 785, 794.

CONCLUSION

Both the district court and the court of appeals have dealt with this complaint as if the fiery issue of police misconduct were not involved. Yet a threat more predictable to the order of this nation cannot be imagined than should ensue if the federal courts now choose to abandon their critical role of protector of all the citizens of the United States. This litany of error is not a matter of simple technical violations, it is an unexplained application of the judicial power in an unequal manner to shield from scrutiny the motives of the law enforcement community which brought about Fleming's imprisonment.

It must not be forgotten that this man's innocence of the charge of murder is forever imprinted within the historical record of this state by virtue of the conviction of others for the crime. It is intolerable that he be not allowed to show that the tale the district court believed was, like the crudely sensational media blitz which accompanied his arrest, simply a lie.

The Court of Appeals has failed to guarantee that this Petitioner's freedom is the business of the federal courts. Under circumstances in which every other court of the land would assure an equal forum, there is no equality in the 8th Circuit. This court must intervene. It must direct that the rules of procedure be fairly applied.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2051EM

William Fleming,
Appellant,

v.

Greater St. Louis Area Major Case Squad; City of Dellwood; City of Jennings; City of Florissant; Dan Chapman; Robert Lowery; Harry Slaten; Michael Yarborough; and Dennis Cordia,
Appellees.

On Appeal from the United States District Court
for the Eastern District of Missouri.

[UNPUBLISHED]

Submitted: November 17, 1994

Filed: February 14, 1995

Before RICHARD S. ARNOLD, Chief Judge, BRIGHT, Senior Circuit Judge, and McMILLIAN, Circuit Judge.

PER CURIAM.

William Fleming, indicted for the murder of a police officer, was imprisoned for more than seven months in 1987. After his release he filed a complaint under several civil-rights statutes to redress his wrongful incarceration. The District Court[1] granted the defendants' motions for summary judgment, and Fleming appeals. We Affirm.

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[1] The Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri.

I.

Sergeant Koeller, a City of Jennings police officer, was shot in the neck and killed while investigating a burglary. Defendant Michael Yarborough and another police officer found his body lying beside his police car. Additional police officers soon arrived, and a search of the area for witnesses and suspects began. Yarborough participated in the search of the immediate area and later filed a report.

The next day, the Jennings Police Department asked the St. Louis Area Major Case Squad to begin an investigation of the murder. Although there is some dispute as to who in the Jennings Police Department requested the assistance of MCS, defendant Robert Lowery, MCS Chairman of the Board, states that defendant Harry Slaten made the request. Lowery consulted with the three-member MCS Board of Directors and ordered the activation of the MCS. The MCS was composed of police departments from the cities of Dellwood, Jennings, and Florissant. Once the MCS began investigating, the Jennings Police Department stopped its investigation.

Defendant Colonel Dan Chapman of the Dellwood Police Department was the MCS commander for the case, and defendant Officer Dennis Cordia was the MCS report officer. The MCS investigation lasted fifteen days and included interviewing possible witnesses and conducting polygraph examinations.

Following the MCS report to the St. Louis County Police Department, Lieutenant Jack Oliver of MCS applied for a warrant for plaintiff's arrest from the Chief Warrant Officer. Cordia, acting as custodian of the MCS records, went with Oliver. The Warrant Officer granted the request for the warrant, and Fleming was arrested. The MCS file for this investigation was then closed, and the Jennings Police Department resumed its supervision of the case.

On February 29, 1987, William Fleming was indicted for murder in the first degree by the Grand Jury of St. Louis County. Following a bail hearing, plaintiff remained incarcerated until September 1987, when charges against him were dropped, and he was released. Subsequently, two other men have been found guilty of the murder of Sergeant Koeller.

Fleming brought a complaint against the three cities and five other defendants under 42 U.S.C. §§ 1981, 1983, 1985, and 1988 for violations of his Fourth, Fifth, Eighth, and Fourteenth Amendment rights. The defendants moved for summary judgment; the District Court granted the motions and dismissed the claims. On appeal, Fleming alleges nine grounds of reversible error by the District Court. We affirm.

II.

Our review of an order granting summary judgment is governed by the same standard the District Court employed — whether the record, viewed in the light most favorable to the non-moving party, shows that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Save Our Health Organization v. Recomp of Minnesota. Inc.*, 37 F.3d 1334 (8th Cir. 1994). If the moving party makes an initial shoving that no question of fact exists, the non-moving party must then point out specific facts showing that there is sufficient evidence which would allow a jury to return a verdict for it. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249 (1986). If the non-moving party cannot provide such facts, then an order granting summary judgment is appropriate and will stand.

None of Fleming's allegations convinces this Court that the District Court erred in granting summary judgment. Fleming proffers no factual evidence to support any of his claims that the cities acted in a discriminatory manner against him or against the black community. His allegations of discriminatory actions and

conspiracies are vague, conclusory, and based on hearsay. Such statements cannot rebut the evidence that the moving parties submitted to show that the cities did not possess a policy of discrimination against the black community, or a custom of permitting or authorizing the procuring of false testimony, or a practice of arresting individuals without cause.

As to the allegations against the individual police officers involved in this investigation, Fleming presents no evidence to prove that the defendants caused the production of improper evidence or that any of the defendants participated in the investigation in anything other than a limited manner. The plaintiff must show at least a causal connection between the misconduct complained of and the official sued. *Harris v. Pirch,* 677 F.2d 681, 685 (8th Cir. 1982). As we review the actions of each defendant in turn, we find that Fleming has not shown the necessary causal connection for liability to attach to any of the defendants.

Yarborough, the first officer to arrive at the scene of the murder, secured the area, investigated the scene, and filed a report. His involvement with the case stopped after that. The plaintiff argues these actions are enough for this Court to find that Yarborough's preliminary investigation and subsequent report denied Fleming his civil rights and also show that he acted in a conspiracy with the other officers to deprive Fleming of those rights. We cannot find that such minor participation with the investigation is enough to establish a link between Yarborough and the alleged mistreatment of Fleming.

The only fact Fleming cites against Slaten is that Slaten contacted the MCS Board to request its investigation of the murder of Sergeant Koeller. These actions alone are not enough to find liability, especially considering that it is up to the MCS Board to decide whether it would investigate or not. Fleming attempts to use Slaten's position as police chief for the City of

Jennings to place liability on him. Although Slaten would have seen reports from the investigation, he was not directly involved with the investigation or indictment of Fleming, and he cannot be found liable under the doctrine of respondeat superior. *Wilson v. City of North Little Rock*, 801 F.2d 316 (8th Cir. 1986).

Lowery is the Chief of Police for the City of Florissant and Chairman of the Board of Directors of the MCS. He was part of the Board which decided to activate the MCS, but once the MCS was activated, the investigation was turned over to MCS Commander Dan Chapman, and Lowery had nothing further to do with this investigation. Lowery's involvement with the arrest of Fleming is minimal and does not reveal any direct responsibility for the alleged improper action.

The evidence presented to the District Court about Chapman was that he signed a warrant application and presented evidence to the magistrate judge for Fleming's arrest. There is nothing that shows that Chapman knew that any of the evidence was fabricated or coerced; he did not gather the evidence or interview any of the witnesses. His responsibility was to oversee the investigation. Except for Fleming's speculations, nothing shows that Chapman had any knowledge that the investigation was handled in bad faith. As noted above, an action against police supervisory officers cannot be based upon the theory of respondeat superior. *Monell v. Department of Social Services*, 436 U.S. 658, 690-94 (1978). For liability to attach, the supervising police officer must be directly responsible for the alleged misconduct. *Pirch*, 677 F.2d at 685. There is no evidence that Chapman had any direct responsibility for any of the alleged misconduct. Therefore, summary judgment was proper.

The remaining defendant is Dennis Cordia, the records clerk. His only involvement in this case was ministerial; he kept the papers generated by the investigation in order. His involvement is not enough to attach any kind of liability to him.

In light of the facts before this Court, we do not see that any of the defendants acted in bad faith or that they took any actions with deliberate disregard for Fleming's constitutional rights. Not one of these defendants has enough personal involvement in the investigation of this case to allow a jury to return a verdict for the plaintiff.

Fleming also alleges that he was falsely arrested. He does not, however, offer any real evidence that the officers did not have a good-faith basis for his arrest. His arrest followed an indictment by a grand jury based on evidence the grand jury felt was worthy of belief. Fleming offers nothing but speculation to support the notion that anyone acted improperly in obtaining or presenting evidence that the grand jury heard. This Court will not look behind a grand jury's finding that probable cause exists without something more than conjecture. The grand jury indictment serves to break a chain of causation between an alleged false arrest and a violation of constitutional rights.

We affirm the District Court's grant of summary judgment.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2051EMSL

William Fleming,
Appellant,

vs.

Greater St. Louis Area Major Case Squad, et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellant's petition for rehearing has been considered by the Court and is denied.

March 16, 1995

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV185SNL

WILLIAM FLEMING,
Plaintiff,

vs.

GREATER ST. LOUIS MAJOR CASE SQUAD, ET AL.,
Defendants.

ORDER

[Filed: March 15, 1994]

In accordance with the memorandum filed herein this day,

IT IS HEREBY ORDERED that defendant Dan Chapman's motion for summary judgment (#63), filed September 30, 1993 be and is **GRANTED** in its entirety. Summary judgment is entered for the defendant and against the plaintiff on the merits of the plaintiff's complaint. This cause of action is hereby **DISMISSED** and removed from the Court's trial docket of April 18, 1994.

Dated this 15th day of March, 1994.

/s/ Stephen N. Limbaugh
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV185SNL

WILLIAM FLEMING,
Plaintiff,

vs.

GREATER ST. LOUIS MAJOR CASE SQUAD, ET AL.,
Defendants.

MEMORANDUM

[Filed: March 15, 1994]

On February 11, 1984 this Court entered summary judgment in favor of defendant Dan Chapman on the merits of the plaintiff's §1983 claim based upon *respondeat superior* and the plaintiff's §1985 claim. However, in his response to defendant Chapman's summary judgment motion, plaintiff raised the issue of qualified immunity (i.e. lack there of) for the first time. The Court decided to allow defendant Chapman to address the issue of qualified immunity before rendering a final decision on the defendant's motion for summary judgment (#63). On February 25, 1994 defendant Chapman filed his response to the Court's order addressing the issue of qualified immunity.

To reiterate the plaintiff's position, he contends that the Major Care Squad indulged in "wholesale arrest of black persons" and that "no one knew whether the assailant was black or white." He specifically contends that defendant Chapman was instrumental in having the plaintiff falsely accused, arrested, and imprisoned "without a jot of proof of his involvement in the shooting." Plaintiff's Response to Chapman's Motion for Summary Judgment, pgs. 10 and 14.

The Court interpreted the plaintiff's statements as advancing the argument that he was arrested without probable cause. The Court reviewed the defendant's evidence on the record.[1] Although the evidence was substantial, the Court felt that the defendant should be given the opportunity to respond to the plaintiff's contention that he was arrested without probable cause. Defendant Chapman has now filed his affidavit and submitted documents to support his position that probable cause existed for the plaintiff's arrest and that he is entitled to the protection of qualified immunity.

The following is a reiteration of the relevant holdings and caselaw pertaining to qualified immunity and its application to a police officer's actions in effecting an arrest.

Public officials, such as governors, prison officials, school board members, parole board members, and police officers, who exercise some discretionary functions while carrying out their executive duties generally have available to them qualified or good faith immunity from §1983 actions. These persons are immune from suit on the basis of good faith immunity unless their conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). In *Anderson v.*

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[1] In his Answers to the plaintiff's second set of interrogatories, Chapman attaches a copy of a progress report, dated November 23, 1987, regarding the Koeller murder investigation. The report lists several witnesses, their testimony, and whether the witness recanted or continued to be cooperative in the investigation. The plaintiff, his brother, and two other persons are listed as suspects. The report reflects a number of witnesses making incriminating statements regarding the plaintiff and his brother's alleged involvement in the planned burglary at the Northland Shopping Center and the subsequent murder of Officer Koeller. Several of the witnesses placed the plaintiff and his brother at the murder scene shortly before the discovery of Koeller's body. A black skull cap was found beneath the body and hair samples from the cap were consistent with hair samples taken from plaintiff's brother.

Creighton, 483 U.S. 635 (1987), the Supreme Court examined the scope of the *Harlow* "clearly established" standard. Whether a public official protected by qualified immunity may be held personally liable for the alleged unlawful action will depend on the "objective legal reasonableness" of the action, which must be assessed in light of the laws or "legal rules" that were "clearly established at the time the action occurred. *Anderson*, at 639-40. The Court specifically held that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right". *Id.*, at 639-40.

When a police officer's request for a warrant allegedly caused an unconstitutional arrest, the objective reasonableness standard of *U.S. v. Leon*, 468 U.S. 897 (1984) will define the police officer's qualified immunity. However, the immunity will be lost "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable. . .". *Malley v. Briggs*, 475 U.S. 335, 345 (1986). The pivotal question is "whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Id.*, at 345.

The issue then before this Court is whether defendant Chapman, a reasonably competent police officer, could have reasonably believed that probable cause existed to seek out a felony arrest warrant against the plaintiff for the murder of Officer Koeller.

In Missouri, the courts have defined probable cause as "knowledge of facts and circumstances sufficient for a prudent person to believe the suspect is committing or has committed an offense." *State v. Kroll*, 682 S.W.2d. 78, 82 (Mo.App.1982), *State v. Giffin*, 640 S.W.2d. 128, 131 (Mo.App.1982). Probable cause to arrest does not require absolute certainty that the suspect did indeed commit the crime. *Giffen*, at 131 citing *State v. Perry*, 499 S.W.2d. 473 (Mo.1973). Furthermore, Rule 22.03 VAMR requires an independent finding of the issuing court that the felony

complaint has sufficient facts to show probable cause that a felony has been committed by the suspect. *State v. Adams,* 791 S.W.2d. 873, 877 (Mo.App.1990).

Defendant Chapman has filed an affidavit and copies of relevant documents to support his "reasonable and good faith" belief that probable cause existed to seek out a felony arrest warrant against William Fleming for the murder of Officer Kenneth Koeller. Defendant attests, and the filed exhibits support, that at the time of the plaintiff's arrest, certain physical evidence and witness testimony incriminated the plaintiff in the murder of Officer Koeller. This included:

1) Numerous witnesses' statements indicating the plaintiff and his brother's involvement in a planned burglary at the Northland Shopping Center at the time of Officer Koeller's murder. (These statements are contained in the progress report previously filed and noted in Footnote 1 of this memorandum).

2) The identification of the plaintiff and his brother by an undercover security guard at the Lerner's Store, which is adjacent to the burglarized shop outside which Officer Koeller's body was discovered. The security guard identified the plaintiff, his brother, and a third man as being in the Lerner's Store shortly before the burglary and murder of Officer Koeller. She further identified plaintiff and his brother as wearing skull caps, one of which was later found underneath Officer Koeller's body.

3) The skull cap contained hair samples which were consistent with hair samples taken from the plaintiff's brother.

4) Certain false statements (regarding a "poncho) made by the plaintiff's brother.

5) Plaintiff's "disappearance" for approximately one week following the murder of Officer Koeller.

Plaintiff has not refuted any of the evidence presented by the defendant as to the circumstances surrounding his arrest. Plain-

tiff has not presented any caselaw which would indicate that the facts as presented would not constitute probable cause for the swearing out of a felony complaint against him. Plaintiff has failed to demonstrate in any way, by setting forth specific facts or affirmative evidence, that the defendant does not meet the requirements for the protection of qualified immunity.

In the instant matter, Officer Dan Chapman clearly possessed sufficient reliable information to establish probable cause to believe that plaintiff had committed or participated in the murder of Officer Koeller. The Court finds that probable cause existed for the swearing out of a felony complaint against the plaintiff for the murder of Officer Kenneth Koeller. The Court will grant the defendant's motion for summary judgment and accord him the protection of qualified immunity in this cause of action.

Dated this 15th day of March, 1994.

/s/ Stephen N. Limbaugh
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV185SNL

WILLIAM FLEMING,
Plaintiff,

vs.

GREATER ST. LOUIS MAJOR CASE SQUAD,
Defendant.

ORDER

[Filed: Feb. 11, 1994]

In accordance with the memorandum filed herein this day,

IT IS HEREBY ORDERED that defendant Chapman's motion for summary judgment (#63), filed September 30, 1993 be and is **GRANTED** in part. Summary judgment is entered for the defendant and against the plaintiff on the merits of the plaintiff's §1983 claim based upon *respondeat superior* and his §1985(3) claim.

IT IS FINALLY ORDERED that defendant Chapman shall have the opportunity to address the issue of qualified immunity as raised in the Plaintiff's Response to Chapman's Motion for Summary Judgment (#67). Defendant Chapman shall file, on or before February 25, 1994 any brief and/or exhibits that he wishes the Court to consider in making a final ruling on this issue. Once this response time has expired, the Court will consider the issue ripe for disposition.

Dated this 11th day of February, 1994.

/s/ Stephen N. Limbaugh
UNITED STATES
DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 94-2051

WILLIAM FLEMING,
Plaintiff-Appellant,

v.

GREATER ST. LOUIS AREA MAJOR CASE SQUAD; CITY OF DELLWOOD; CITY OF JENNINGS; CITY OF FLORISSANT; DAN CHAPMAN; ROBERT LOWERY; HARRY SLATEN; MICHAEL YARBOROUGH; AND, DENNIS CORDIA;
Defendants-Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION

HONORABLE STEPHEN N. LIMBAUGH

PETITION FOR REHEARING

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Counsel for Appellant

SUMMARY OF THE CASE AND REQUEST FOR REHEARING

The Court of Appeals has affirmed a judgment of the District Court which dismissed the claims of Appellant, William Fleming, for damages arising from his wrongful arrest in 1987. The opinion of this court has disposed of this appeal in which nine issues of error are presented in an opinion which cites only three supporting cases. Rehearing is urged because at least five substantial issues remain unaddressed each of which should result in reversal of the District Court decision.

ARGUMENT

I.

QUALIFIED IMMUNITY

The District Court has declared that the defendant police officers are clothed with the mantle of qualified immunity. That concept, ignored by the opinion of this Court, defines the analytical framework of this appeal. This is no ordinary summary judgment proceeding. It is a review of allegations of police misconduct for which the application of the doctrine of official immunity is "qualified" by a double-pronged analysis which these defendants did not meet and which the District Court did not require.

It is a cornerstone of the law of immunity that the action of the officer claimed to be immune from tort liability must arise from and be compelled by the position and duties of that office. In this case, neither the condition of compulsion nor the companion requirement that the action be within the scope of the official function was ever met. *Harlow v. Fitzgerald,* 457 U.S. 800, 819 (N.34), 73 L.Ed.2d 396, 411, 102 S.Ct. 2727 (1982). In their District Court motions the defendants utterly failed to produce a quantum of proof upon which the threshold standard for immunity could be based. What was shown, instead, was an area-wide

manhunt by an informally organized group of officers operating outside their statutorily-limited jurisdictions. It is a glaring error of substance that the district court granted immunity where it does not belong.

II.

THE SECTION 1985 CONSPIRACY CLAIM

The opinion of this court has judged the claims of false arrest, false indictment and denial of bail as a single cause of action and has erroneously applied a one-dimensional review of the conduct of the individual defendants. However, Fleming's complaint deserves more thorough analysis since it suggests a more complex purpose than the mere coincidental negligence of individual police officers. He alleges and should be allowed to demonstrate to a jury that the actions of these defendants were part of a concerted effort - a combination - designed to prevent public recognition of the failure to solve by lawful means the murder of the Jennings police officer.

Appellant's theory that his arrest was an intentional sacrifice of constitutional guarantees designed to mollify local media scrutiny of the performance of the Major Case Squad is a cause of action under §1985 that cannot be judged by standards which apply where individual actions are involved. This is a conspiracy and it is in the nature of a conspiracy that the improper results are brought about by the conduct of several persons any of whose involvement might not be sufficiently culpable to support individual liability. For this reason, and because of the requirement to show a specific discriminatory animus, a 1985 action is *not* subject to the heightened pleading standard of qualified immunity. *Burrell v. Board of Trustees of Georgia Military College,* (11th Cir. 1992) 970 F2d at 788.

III.

CIRCUMSTANTIAL EVIDENCE OF CAUSATION

The Court has adopted, throughout the unpublished opinion, a terminology of description that unfairly characterizes Appellant's proffer of proof as "vague and conclusory" (Opinion p. 4 line 5). Elsewhere the defendant's involvement is labelled "minor participation (Opinion p. 4 line 29). This commentary upon the evidence was an improper function in the order of the District Court. It is no more defensible for the Court of Appeals to suggest that the history, the context, and the racial mathematics of this case—the circumstantial evidence—might not constitute in its totality an offer of "real evidence" of lack of good faith by the officers. (See Opinion p. 6 line 13).

That the investigation assumed immediately, an unwarranted focus in the black community is not a "vague" notion. It is a fact contained in and derived by simple arithmetic from the documentary record of the investigation which was presented to the District Court without challenge. It is furthermore an unchallenged fact that a white citizen was spared the personal embarrassment, inconvenience, and risk of prolonged incarceration even though he admitted being present at the time and within the area of the commission of the crime.

These evidentiary elements are not based upon 'hearsay' as the opinion suggests. They form an authentic record of the events from which a finding of racial animus is clearly reasonable. They are relevant if sordid details of this regrettable affair that can establish for a jury the malignant intent to vent the legitimate frustration of the community upon innocent black persons with no articulable connection to the crime.

IV.

THE DENIAL OF BAIL IS A SEPARATE OFFENSE

Fleming's separate claim that the defendant's misrepresentations caused him to be denied a reasonable bail has been ignored in the court's opinion. In neglecting to address this issue, the court has affirmed the improper result that Fleming's arguably legitimate arrest may shield from further scrutiny the officers' subsequent acts. This conclusion cannot be sustained and should be re-addressed on rehearing since an officer's good-faith remains subject to challenge despite a supervening judicial proceeding. *Malley v. Briggs,* 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). Fleming's right to have his request for bail considered fairly was a distinct right, deserving of individual attention apart from any determination of the validity of his arrest.

V.

The court has suggested that Fleming's allegations of discriminatory action are 'based on hearsay' and therefore insufficient to 'rebut' the defendants' evidence of proper purpose. (Opinion p. 4 line 5). This is an erroneous statement of the law. The affidavits offered to demonstrate prior racist activities by these defendants are the kind of evidence of prior behavior specifically authorized by this circuit in *Lovejoy v. Goodrich,* (8th Cir. 1986), 798 F2d 13201 at 1203. The U.S. Supreme Court has affirmed moreover, that evidence to survive summary judgment need not be presented in a format that would be admissible at trial. A defendant is not required to "depose his own witnesses". *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

It is, finally, a hollow indictment to charge Fleming with a failure "to offer any evidence" of bad faith by the officers where the opportunity to do so was foreshortened and foreclosed by the district court which requested, received and considered the

defendants' additional probable-cause related materials. (Appendix p. A-6). A greater injustice cannot be imagined than the assumption by the judge of the function of trier of fact while refusing to entertain Fleming's side of the argument. (See Brief of Appellant p. 25-26).

This Court should not allow the provisions of Rule 56 to be dismissed discounted and ignored.

CONCLUSION

Because the opinion of the Court of Appeals is incomplete and does not address the elements of Appellant's appeal that should require reversal of the District Court, a rehearing of this matter should be ordered.

/s/ Helton Reed
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ATTORNEY FOR
PLAINTIFF-APPELLANT
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361-1708

This is to certify that two copies of the foregoing Petition for Rehearing were delivered to the offices of the following counsel this 28th day of February, 1995:

APPENDIX F

42 USC § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX G

42 USC § 1985(3)

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

APPENDIX H

Federal Rules of Civil Procedure — Rule 56

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial

controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions answers to, interrogatories, or further affidavits When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

APPENDIX I

U.S. District Court - Eastern District — Rule 7B(2)

(2) Except with respect to a motion for summary judgment under Rule 56, Federal Rules of Civil Procedure, each party opposing a motion shall serve and file, within five (5) days after being served with the motion, any written brief containing any relevant argument and citations to authorities on which the party relies. If any motion requires consideration of facts not already appearing in the record, the party shall serve and file with its brief copies of all documentary evidence, affidavits, or photographs required or permitted by the Federal Rules of Civil Procedure. A party opposing a motion for summary judgment under Federal Rule of Civil Procedure 56 shall serve and file any written brief or memorandum of law and any appropriate extra-pleading materials within twenty (20) days after being served with the motion.

Supreme Court, U.S.
FILED
JUL 7 1995
OFFICE OF THE CLERK

(2)

No. 94-2038

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM FLEMING, et al.,
Petitioner,

vs.

GREATER ST. LOUIS AREA MAJOR CASE SQUAD; CITY OF DELLWOOD, MISSOURI; CITY OF JENNINGS, MISSOURI; CITY OF FLORISSANT, MISSOURI; DAN CHAPMAN; ROBERT LOWERY; HARRY SLATEN; MICHAEL YARBOROUGH; AND DENNIS CORDIA
Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS SLATEN, YARBOROUGH AND CITY OF JENNINGS

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No. 94-2038

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Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS SLATEN, YARBOROUGH AND CITY OF JENNINGS

This Brief in Opposition is filed on behalf of Defendants Slaten, Yarborough, and the City of Jennings. The purpose of this Brief will be to focus on the reasons, related to these Defendants, that the Petition for Writ of Certiorari should be denied.

Rule 14

It should be noted that Petitioner has included in the Appendix the opinion of the Eighth Circuit Court of Appeals and the Order of the District Court which granted summary judgment to Defendant Chapman. However, the Orders of the District Court granting Summary Judgment to the other Defendants, including these Defendants, have not been provided. It appears that Rule

14 (k) (ii) contemplates that rulings by the District Court which were affirmed on appeal should be provided so that this Court, in its review, can understand why the District Court ruled as it did and why the Court of Appeals affirmed. The Petition does not comply with this requirement.

THE FACTS

The Petition for a Writ of Certiorari filed with this Court recites facts which are clearly incomplete. Petitioner points out that Plaintiff was black, that he was arrested and charged with murder of a police of ficer, and that he was later released, and it also points out that two other men were ultimately charged and convicted of the crime. However, Petitioner does not provide the Court with the underlying facts from which the Court could make any judgment that the claims asserted against these Defendants have any valid basis. For example, Petitioner ignores evidence that was presented to the District Court by these Defendants in connection with their Motions for Summary Judgment showing their non involvement in the securing of witnesses and presentation of evidence to the Grand Jury which resulted in Petitioner's incarceration. It also ignores the fact that Petitioner, although he had ample time to have gathered evidence, failed to present any competent evidence by affidavits or otherwise which would have provided any proper basis for denial of the Motions for Summary Judgment by the District Court. Thus, fair consideration of what occurred in the District Court shows that there was evidence indicating that there was no basis for liability of these Defendants and no competent evidence to the contrary.

While it does not involve these Defendants, we note that Petitioner complains, in connection with the granting of Summary Judgment to Defendant Chapman, that the District Court invited Defendant Chapman to submit material supporting his position and Petitioner then asserts that the District Court ruled

on Defendant Chapman's motion before Petitioner had an opportunity to respond to the material submitted by Defendant Chapman. As far as we have been able to determine, no request was made to the District Court to set aside the ruling and to give Petitioner an opportunity to submit any material in opposition to what Defendant Chapman gave the District Court. Without this kind of request to the Court below, it does not appear that anything was preserved for appeal.

In any event because, with respect to these Defendants, Petitioner failed to present to the District Court facts showing why these Defendants should be liable to Petitioner, the District Court and the Court of Appeals were clearly correct in holding that these Defendants were entitled to Summary Judgment.

The Opinion of the Court of Appeals makes clear the lack of evidence against these Defendants. It points out that Defendant Yarborough merely was called to the scene, asked for assistance and directed the initial search of the area and then wrote a report. As to Defendant Slaten, the opinion of the Court of Appeals shows that the argued basis for Petitioner's claim against him was that he contacted the Major Case Squad in St. Louis to request that it take over the investigation ofthe murder of Sgt. Keller. The Court of Appeals' Opinion points that it was the officer selected by the Major Case Squad who directed the investigation which resulted in evidence which was presented to a Grand Jury, not Defendant Slaten. Petitioner's incarceration, of course, took place because of the determination by the Grand Jury that there was a valid basis for taking action against Petitioner. Finally, with respect to the City of Jennings, the Court of Appeals affirmed the District Court in its ruling that the City had filed the affidavit of its Mayor which showed that there was no policy on the part ofthe City authorizing or permitting the kind of conduct Petitioner complained about in his complaint and that Petitioner had failed to file in opposition to the City's affidavit, any proper affidavits or other competent evidence to support the allegations

of unconstitutional policies and therefore had failed to show that an issue of material fact existed as to the liability of the City of Jennings.

DISCUSSION

While Petitioner's Brief makes very serious accusations about a conspiracy against the black race and improper police conduct in the securing of evidence against the Petitioner, the proceedings below presented showed clearly that Petitioner did not have competent or relevant evidence to support those grave accusations. It is, of course, certainly most unfortunate that Petitioner was incarcerated, but the uncontroverted fact is that his confinement followed an indictment by a Grand Jury and was based on evidence that the Grand Jury felt was worthy of belief. There is nothing in what Petitioner has presented, other than unsupported rhetoric and speculation, to support the notion that anyone acted improperly in obtaining or presenting the evidence that the Grand Jury heard.

More important with respect to these Defendants, there is no evidence whatever that any act of Defendants Yarborough, Slaten, or the City of Jennings, caused the production of improper evidence. Thus, even if it is assumed that someone did act improperly, there is no evidence relating such improper acts to these Defendants.

The evidence shows, without dispute, that Defendant Yarborough had nothing at all to do with the Petitioner, William Fleming. His sole involvement was the investigation at the scene of the murder and the preparation of the initial report of investigation. Defendant Slaten's act on which Petitioner focuses was the calling in of the Major Case Squad, which is standard procedure in St. Louis in this serious kind of crime. Petitioner never presented any evidence that the calling in of the Major Case Squad was, in fact, improper in any way, or a valid basis for

the imposing of liability on Defendant Slaten. Finally, the case against the City of Jennings rested on nothing but unsupported speculation. The Mayor of the City stated clearly in his affidavit that the City does not authorize the kind of policies that Petitioner asserts in the complaint, and Petitioner did not present any proper and relevant evidence to show otherwise.

It is important to note the substantial length of time that this suit was on file before the Motions for Summary Judgment were filed. The situation was one where Petitioner had ample time to obtain and produce evidence to support the charges of wrongdoing on the part of these Defendants, as well as other Defendants in the case, but Petitioner failed to present such evidence to the District Court. He presented neither affidavits nor depositions to support his claim that the Major Case Squad caused tainted evidence to be presented in order to obtain an indictment.

CONCLUSION

Under the circumstances in this record, the District Court was clearly correct in sustaining the Motions for Summary Judgment filed by these Defendants, and there is no proper reason that these Defendants should be put to the substantial expense involved in presenting the matter before this Court.

Respectfully submitted,
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CERTIFICATE OF SERVICE

Comes now Counsel for Respondents Slaten, Yarborough and City of Jennings and hereby certifies that three (3) copies of their brief have been mailed on this 7th day of July, 1995, to: Mr. Helton Reed Jr., Attorney for Plaintiff 2616 N. Kingshighway, St. Louis, Missouri 63113; Mr. Henry D. Menghini, Attorney for Defendants City of Florissant, Robert Lowery and Dennis Cordia, 200 North Broadway, Suite 1200, St. Louis, Missouri 63102; and Mr. John G. Enright, Attorney for Defendants City of Dellwood and Dan Chapman, 1015 Locust, Suite 500, St. Louis, Missouri 63101.

/s/ F. Douglas O'Leary
F. Douglas O'Leary

Supreme Court, U.S.
FILED
JUN 12 1995
CLERK

No. 94-2038

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM FLEMING,
Petitioners,

vs.

GREATER ST. LOUIS AREA MAJOR CASE SQUAD, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION
OF RESPONDENTS ROBERT LOWERY, DENNIS CORDIA AND THE CITY OF FLORISSANT, MISSOURI

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QUESTIONS PRESENTED

1. Whether the District Court properly granted summary judgment on Petitioner's 42 U.S.C. § 1983 claims in favor of Respondents Lowery and Cordia, based on their lack of personal involvement with any of Petitioner's alleged constitutional deprivations, four months after they filed their Motion for Summary Judgment with attached affidavits and granted summary judgment in favor of the City of Florissant, Missouri almost five months after it filed its Motion for Summary Judgment with attached affidavits where Petitioner had the time required by Fed.R.Civ.P. 56 and Local Rule 7(B)(2) of the United States District Court, Eastern District of Missouri to file "counteraffidavits."

2. Whether the District Court properly granted summary judgment in favor of Respondents Lowery, Cordia, and the City of Florissant on Petitioner's 42 U.S.C. § 1985(3) claim where these Respondents did not deprive Petitioner of his constitutional rights and Petitioner failed to offer a single piece of factual evidence to support a § 1985 conspiracy claim against them.

LIST OF PARTIES TO THE PROCEEDING

Petitioner:

William Fleming

Respondents:

Greater St. Louis Area Major Case Squad

City of Dellwood, Missouri

City of Jennings, Missouri

City of Florissant, Missouri

Dan Chapman

Robert Lowery

Harry Slaten

Michael Yarborough

Dennis Cordia

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42 U.S.C. § 1985(3) 4, 5, 11, 12, 13

Federal Rules of Civil Procedure

Fed.R.Civ.P. 56(c) 5, 6, 7
United States District Court of Eastern Missouri Local Rule 7(B)(2) 5, 6

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM FLEMING,
Petitioners,

VS.

GREATER ST. LOUIS AREA MAJOR CASE SQUAD, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION
OF RESPONDENTS ROBERT LOWERY, DENNIS CORDIA AND THE CITY OF FLORISSANT, MISSOURI

To the Honorable Supreme Court:

Respondents Robert Lowery, Dennis Cordia, and the City of Florissant, Missouri respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion in this case.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Eighth Circuit is reproduced in the Appendix to the

Petition for Writ of Certiorari. (A.1–A.6). The Order and Memorandum of the United States District Court, Eastern District of Missouri, Eastern Division filed March 15, 1994 dismissing the cause of action and removing the case from the court's trial docket are reproduced in the Appendix to the Petition for Writ of Certiorari. (A.8 – A.13). The District Court's Order and Memorandum of August 19, 1993 granting Respondents Lowery and Cordia's Motion for Summary Judgment and dismissing them from the case are reproduced in the Appendix of this Brief in Opposition. (A.2 – A.11). Their Motion for Summary Judgment with affidavits is reproduced in this brief. (A.12 – A.19). The District Court's Order and Memorandum of February 11, 1994 granting Respondent City of Florissant, Missouri's Motion for Summary Judgment and dismissing the City of Florissant as a party are reproduced in Respondents' Appendix to the Brief in Opposition. (A.20 – A.25). The City's Motion for Summary Judgment with an affidavit is reproduced in this brief. (A.26 – A.30).

STATEMENT OF THE CASE

On January 27, 1987, Sergeant Kenneth Koeller of the City of Jennings, Missouri Police Department was shot and killed after he received a call to investigate a burglary in Jennings, Missouri. Respondent Michael Yarborough, a Jennings police officer, also responded to the burglary call and discovered Sergeant Koeller's body. Respondent Yarborough called for an ambulance and further assistance. Within minutes, six to ten additional officers arrived. They searched the area for suspects and witnesses. The next day the Jennings Police Department asked for the immediate activation of the Greater St. Louis Area Major Case Squad ("Major Case Squad") to investigate the killing, because it had discovered no witnesses, no suspects, and had very few leads. The Major Case Squad is an association composed of the police departments of municipalities located in the greater St. Louis metropolitan region.

Respondent Robert G. Lowery was Chief of Police for the City of Florissant, Missouri and Chairman of the three member Board of Directors of the Major Case Squad. After he consulted with the other board members by telephone, the board voted to activate the Major Case Squad and turned the investigation over to Respondent Dan Chapman, commander for the case and an officer with the City of Dellwood, Missouri Police Department. The board is never involved in the day–to– day management of an investigation. (A.15 – A.16).

Respondent Dennis Cordia, a detective with the City of Florissant Police Department, served as Chief Report Officer for the Major Case Squad. During the fifteen day investigation, he compiled and organized the documents generated by Major Case Squad officers. On February 5, 1987, following a Major Case Squad report to the St. Louis County Police Department, officers from the Major Case Squad applied for a warrant for Petitioner's arrest. Respondent Cordia, as custodian of records for the investigation, and at the request of Respondent Chapman, accompanied officers to the office of the Chief Warrant Officer for his review of the case. Cordia referenced records in the file as requested and performed other clerical duties. He also scheduled the polygraph examinations for certain witnesses and made transportation arrangements. Respondent Cordia did not participate in the administration or evaluation of these examinations. (A.17 – A.19).

After a warrant was issued, Petitioner was arrested on February 6, 1987. The Major Case Squad closed its investigation on February 9, 1987, and the City of Jennings Police Department resumed its supervision of the case. On February 29, 1987, Petitioner was indicted for the crime of murder in the first degree by the Grand Jury of St. Louis County, Missouri. On March 5, 1987, the St. Louis County Circuit Court heard and denied Petitioner's Application to Set Bail. Following the bail hearing,

Petitioner remained incarcerated until September 5, 1987, when charges against him were dropped, and he was released.

On January 31, 1992, Petitioner filed a Complaint against nine defendants, including Respondents Lowery, Cordia, and The City of Florissant, Missouri, in the United States District Court, Eastern District of Missouri, Eastern Division alleging many violations of his constitutional rights pursuant to several civil rights statutes. Specifically, Petitioner alleged that Respondents, while investigating the murder of Sergeant Koeller, deprived him of his rights by seeking a warrant for his arrest without probable cause, by presenting false testimony before the Grand Jury which led to his indictment for the murder of Sergeant Koeller, denial of bail, and wrongful incarceration. Count II alleged that Respondents conspired to deprive Petitioner "and all persons of black, Negro or Afro American heritage the equal protection of the laws" which resulted in Petitioner's arrest, indictment, denial of bail, and incarceration.

The District Court disposed of this case in pieces as to the various defendants. On June 30, 1992, it dismissed the Greater St. Louis Major Case Squad. On August 19, 1993, it granted summary judgment to Respondents Lowery and Cordia on grounds that they had no personal involvement in Petitioner's arrest, indictment by the grand jury, denial of bail, and incarceration for seven months. (A.2 – A.11). By separate order, the District Court granted summary judgment to Respondents Yarborough, Slaten, and the City of Jennings. On August 24, 1993, the District Court ordered Petitioner's pendent state law claims for false arrest, false imprisonment, and slander be dismissed as time barred and that Petitioner's § 1981 claim be dismissed for failure to state a claim. On February 11, 1994, the District Court granted summary judgment to the City of Florissant on both the § 1983 and § 1985(3) claims. (A.26 – A.30). On March 15, 1994, the District Court granted summary judgment in favor of Respondent Chapman and dismissed the case. The

Court of Appeals for the Eighth Circuit, in a per curiam opinion, affirmed the District Court's grant of summary judgment to all Respondents.

SUMMARY OF THE ARGUMENT

I. Petitioner presents no issue appropriate to the Court's exercise of its discretionary jurisdiction concerning the district court's grant of summary judgment to Respondents Lowery, Cordia, and the City of Florissant either on procedural or substantive grounds. The District Court issued its Order and Memorandum four months after Respondents Lowery and Cordia submitted their motion with affidavits and to Respondent City of Florissant almost five months after it filed its Motion for Summary Judgment. Petitioner had more time than required under Fed.R.Civ.P. 56 and Local Rule 7(B)(2) to file "counter affidavits." Furthermore, summary judgment with respect to these three Respondents was proper. As chairman of the board of the Major Case Squad, Respondent Lowery did not have the necessary direct and personal involvement to hold him personally liable for deprivation of rights pursuant to 42 U.S.C. § 1983. Respondent Cordia performed only ministerial functions when he was assigned to the Major Case Squad investigation as Report Officer. The City of Florissant did not have any role in the investigation. Nor did it have any custom, practice or procedure that could subject the municipality to § 1983 liability for Petitioner's alleged deprivation of constitutional rights.

II. The district court's grant of summary judgment on Petitioner's 42 U.S.C. § 1985 conspiracy claims presents no issue appropriate for this Court's exercise of its discretionary jurisdiction, because the District Court and the Court of Appeals applied the well settled law of this Court and the courts of appeal of the various circuits when they found that Petitioner presented no facts in support of his § 1985(3) claim against Respondents Lowery, Cordia, and the City of Florissant and failed to state § 1985(3) claims against these Respondents.

REASONS FOR DENYING THE WRIT

Petitioner fails to satisfy the criteria traditionally applied by this Court in determining whether to grant a writ of certiorari. The decisions by the courts below are entirely consistent with the decisions of other federal circuits and this Court, do not conflict with the decisions of the Missouri Supreme Court, do not raise an important issue of general relevance, nor do they depart from the accepted and usual course of judicial proceedings so as to call upon this Court to exercise its power of supervision. Petitioner in essence asks this Court, after consideration by the District Court and the Court of Appeals, to reconsider whether Petitioner presented to the trial court the modicum of evidence required to survive a motion for summary judgment.

I. Respondents Lowery, Cordia and the City of Florissant were entitled to summary judgment as a matter of law where Petitioner failed to show they had any direct, personal involvement in Petitioner's arrest, indictment and incarceration and the District Court issued its Order and Memorandum at least four months after their respective motions, well within the requirements of Fed.R.Civ.P. 56(c) and Local Rule 7(B)2.

Federal Rule of Civil Procedure 56(c) provides that a defending party may at any time move for summary judgment in the party's favor by serving a motion at least ten days before the time fixed for a hearing. U.S. District Court of Missouri, Eastern District Rule 7(B)(2) requires a party opposing a motion for summary judgment to file any written brief or memorandum of law or appropriate extra pleading material within twenty days after being served with the motion. Petitioner never previously raised his contention that the District Court erred by refusing to allow or consider counter affidavits before granting summary judgment as to Respondents Lowery, Cordia, or the City of Florissant, nor could he.

On April 19, 1993, Respondents Lowery and Cordia moved for summary judgment with affidavits. (A.12 – A.19). Four months later, the district court entered an Order and Memorandum granting summary judgment in favor of Respondents Lowery and Cordia on the merits of Petitioner's complaint and dismissed them from the case. (A.2 – A.11). Petitioner filed a Memorandum in Opposition on May 11, 1993. Previously, in July, 1992, Petitioner had filed interrogatories and a request for admissions but conducted no further discovery for the following year with respect to these Respondents.

On September 24, 1993, the City of Florissant, Missouri filed a Motion for Summary Judgment with an attached affidavit by the City's Mayor. (A.26 – A.30). Over four months later, on February 11, 1994, the district court granted summary judgment in favor of the City of Florissant. (A.20 – A.25). Petitioner filed suggestions in opposition on October 6, 1993.

Not only did the district court correctly apply Fed.R.Civ.P. 56(c) procedurally, it correctly entered judgment as a matter of law where all of the evidence before the court demonstrated that there was no genuine issue as to material fact. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Summary judgment is an appropriate disposition of a case where it is clear plaintiff has not or cannot present any set of facts entitling him to the relief sought. Petitioner bore the burden of setting forth specific facts showing that evidence existed to allow reasonably minded jurors to draw inferences that would result in a verdict in his favor. A mere "scintilla" of evidence, "merely colorable" evidence, or evidence "not significantly probative" is insufficient to avoid summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–252 (1986). Petitioner failed to produce the modicum of evidence required to survive the motions for summary judgment of these Respondents.

Before any 42 U.S.C. § 1983 liability can attach to a state actor for a deprivation of rights secured by the federal constitution and laws, the plaintiff must show his harm was caused by a constitutional violation, and the state actor must have some direct responsibility for the alleged wrongdoing.[1] *Baker v. McCollum*, 443 U.S. 137, 140 (1979). By definition, a state actor who has no personal role in the deprivation of constitutional rights "lacks the bad faith required to expose him to damages liability under § 1983." *Harris v. City of Pagedale*, 821 F.2d 499 (8th Cir.) *cert. denied*, 484 U.S. 986. The federal courts uniformly hold that a § 1983 action will not lie against a supervisory police officer for failure to prevent police misconduct, absent a showing of direct responsibility for or involvement in the improper conduct. *Rizzo v. Goode*, 423 U.S. 362, 377 (1976); *Harris v. Pirch*, 677 F.2d 681, 685 (8th Cir. 1982); *Watson v. Interstate Fire & Casualty Co.*, 611 F.2d 120, 123 (5th Cir. 1980); *Kosta v. Hogg*, 560 F.2d 37, 40 (1st Cir. 1977). A plaintiff must show that the supervisor breached a duty to Plaintiff which was the proximate cause of the injury or an affirmative link between the unconstitutional acts of a subordinate officer and the supervisor shown by participation or acquiescence. *McClelland v. Facteau*, 610 F.2d 693, 695–696 (10th Cir. 1979).

The uncontradicted evidence demonstrated that the involvement of Respondents Lowery and Cordia was limited and/or ministerial in nature. Respondents Lowery and Cordia did not seek a warrant for Petitioner's arrest, did not testify before the Grand Jury, did not seek his indictment, nor did they appear or testify before the judge who set Petitioner's bond.

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[1] It is well established that later proof of innocence does not entitle a person mistakenly charged with a crime, arrested, incarcerated, or tried to assert a claim for unconstitutional deprivation of rights against the police officials who conduct the investigation or mistakenly arrest a suspect. *Baker*, 443 U.S. at 145.

Respondent Lowery's police supervisory role as chairman of the board of the Major Case Squad cannot subject him to § 1983 liability based upon the theory of respondeat superior. *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). Respondent Lowery's involvement extended only as far as making the phone calls necessary and voting to activate the Major Case Squad investigation. He had no personal involvement in the subsequent investigation, and his preinvestigation involvement had no causal connection to plaintiff's alleged deprivations. (A.15 – A.16). Petitioner presented no evidence that Respondent Lowery exhibited deliberate indifference to or tacit authorization of a pattern of unconstitutional conduct by the Major Case Squad or failed to train, monitor, supervise, or control the Major Case Squad officers involved in the investigation. Petitioner failed to demonstrate either a pattern of previous misconduct by officers of the Major Case Squad or the failure of Respondent Lowery to take remedial steps following notice of a pattern of unconstitutional conduct by subordinates. Cf. *Wilson v. City of North Little Rock*, 801 F.2d 316, 322 (8th Cir. 1986).

Respondent Cordia, as Report Officer of the Major Case Squad, organized the records and reports of the investigation. At no time did he act in an investigative capacity. He had no personal knowledge of the facts contained in the case report or personal involvement in the investigation, interrogation, or arrest of any suspect or witness. He accompanied a Major Case Squad officer to the office of the chief warrant officer in his capacity as custodian of records and referenced documents as requested. Respondent Cordia did not serve as a proponent of the records. He had no reason to suspect that information in the Major Case Squad Report was false. He scheduled some witness polygraph tests, but he neither administered the tests nor was he present during the examination. (A.17 – A.19). The lower courts correctly found that Respondent Cordia's limited and strictly ministerial functions in the investigation did not provide the

requisite direct involvement or exercise of discretion to attach any kind of liability to him for the alleged deprivation of constitutional rights.

No § 1983 liability attaches for a negligent officer in the performance of ministerial duties. *Daniels v. Williams*, 474 U.S. 327, 328 (1986). The law differentiates between potential § 1983 liability for discretionary duties and no liability for ministerial duties for good reason. If a plaintiff could hold a clerk of records liable for alleged § 1983 deprivations, Petitioner could subject a potentially infinite number of file clerks, dispatchers, typists and secretaries exposed to a case to §1983 suits. Respondent Cordia, acting only in a ministerial capacity in his role as Report Officer, falls within that line of cases dismissing officers whose involvement is ministerial and not directly causally related to plaintiff's harm.

The lower courts never needed to address the issue of qualified immunity for these Respondents since they had not engaged in conduct which could potentially subject them to § 1983 liability. Cf. *Malley v. Briggs*, 475 U.S. 335 (1986).[2]

At the time the City of Florissant moved for summary judgment, Respondents Lowery and Cordia, the only two Florissant officers involved with the Major Case Squad who could have potentially carried out the allegedly unconstitutional practices, policies or customs of the City of Florissant, lacked direct personal involvement and causal relation to the deprivations claimed and had been dismissed from the case. (A.24). If

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[2] Petitioner mis–states *Malley*, 475 U.S. at 345, n. 7. What *Malley* said was that a judge's decision to issue a warrant does not break the causal chain between the "application for a warrant and the improvident arrest". (Petition for Writ of Certiorari, p. 7). The Court of Appeals spoke of the effect of an indictment on the chain of causation between the alleged false arrest and a violation of constitutional rights.

Respondents Lowery and Cordia cannot be held liable under § 1983 for Petitioner's injuries, the City of Florissant cannot be held liable. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 482–483 (1986).

A municipality will not incur § 1983 liability on a theory of respondeat superior. Municipal liability only attaches where the municipality itself causes the constitutional violation by a city custom, policy, procedure, regulation, or failure to train municipal employees which amount to deliberate indifference to the right of persons. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989). The City of Florissant had no explicit or implicit policy, ordinance, regulation, practice, or custom to arrest without probable cause, procure false testimony, or act unconstitutionally in the manner asserted by Petitioner. (A.29 – A.30). Petitioner failed to provide any evidence that the City of Florissant condoned any unconstitutional custom, practice, policy or lack of training. It necessarily follows that the District Court properly granted summary judgment to the City of Florissant.

II. Petitioner cannot state a § 1985(3) conspiracy claim against Respondents Lowery, Cordia, and the City of Florissant where Respondents Lowery and Cordia, the only municipal actors for the City of Florissant have not violated Petitioner's constitutional rights by any acts or failure to act, because the City of Florissant cannot carry out acts in furtherance of a conspiracy to deprive Petitioner of his constitutional rights absent a violation of his rights by its agents.

Petitioner attempts to paint a picture of a § 1985(3) conspiracy claim in Count II which stood alone and unrebutted by the Respondents. However, examination of the Complaint shows that the factual basis for the conspiracy claim in Count II was the same as Count I. Plaintiff's attempt to draw a distinction between the claims is a distinction without a difference. Al-

though Counts I and II have different legal bases, the allegations in support are identical. By putting the underlying factual allegations in issue through affidavit and motions for summary judgment, Respondents Lowery, Cordia, and the City of Florissant demonstrated that there was no factual support for any of Plaintiff's conclusory allegations against these Respondents in either Counts I and II. The District Court concluded that the Petitioner had made only "vague and conclusory allegations about a conspiracy" and had "not offered a single piece of factual evidence to support any of his conspiracy allegations." The City of Florissant could not act in a conspiracy to deprive Petitioner of his rights if its "municipal actors have been judicially determined not to have violated" Petitioner's constitutional rights. (A.24).

Petitioner failed to plead or support his § 1985(3) conspiracy claim with the requisite particularity, specifically demonstrating with material facts that Respondents Lowery, Cordia, and the City of Florissant, singly or together, reached an agreement with others to deprive the Petitioner of the equal protection or equal privileges and immunities under the law, that Respondents committed an act in furtherance of the conspiracy, or that Petitioner suffered an injury or was deprived of rights and privileges secured by the federal constitution and the laws. Nor did he show a pattern of conduct of these Respondents by which he could prove some racial or class based "invidiously discriminatory animus" behind the alleged conspirator's action. *Griffin v. Breckenridge*, 403 U.S. 88, 102–103 (1971); *City of Omaha Employees Betterment Assn. v. Omaha*, 883 F.2d 650, 652 (8th Cir. 1989).

Respondents Lowery and Cordia had already shown that they had committed no acts in respect to the issuance of a warrant, arrest, indictment, bail hearing, or incarceration of Petitioner and did not violate Petitioner's constitutional rights. Petitioner's belief that Respondents participated in a racially motivated

conspiracy to harass African-Americans is not evidence. Therefore, Petitioner could not state a § 1985(3) conspiracy claim against Respondents Lowery, Cordia, and the City of Florissant. Petitioner merely recast his unsubstantiated allegations in his Complaint into overheated rhetoric on appeal and in his Petition to this Court.

Summary Judgment on Petitioner's § 1985(3) claims was required where the record submitted by Petitioner could not lead a rational trier of fact to find for the nonmoving party and Petitioner did not produce facts to show there was a genuine issue for trial. Petitioner failed to offer any evidence of acts by Respondents Lowery, Cordia, and the City of Florissant which deprived Petitioner of his constitutional rights in furtherance of a conspiracy or a pattern of race based invidious discrimination.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,
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APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV185SNL

WILLIAM FLEMING,
Plaintiff,
vs.
GREATER ST. LOUIS AREA MAJOR CASE SQUAD, ET AL.,
Defendants.

ORDER

[Filed: August 19, 1993]

In accordance with the memorandum filed herein this day,

IT IS HEREBY ORDERED that the defendants Lowery and Cordia's motion for summary judgment (#61), filed September 24, 1993 be and is **GRANTED**.

IT IS FURTHER ORDERED that judgment is entered for defendants Lowery and Cordia and against the plaintiff on the merits of the plaintiff's complaint. This cause of action is hereby **DISMISSED** as to defendants Lowery and Cordia.

IT IS FINALLY ORDERED that plaintiff's Motion for Rule 11 sanctions is **DENIED** as moot.

Dated this *19th* day of August, 1993.

/s/ Stephen N. Limbaugh
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV185SNL

WILLIAM FLEMING,
Plaintiff,
vs.
GREATER ST. LOUIS AREA MAJOR CASE SQUAD, ET AL.,
Defendants.

MEMORANDUM

[Filed: August 19, 1993]

This matter comes before the Court on defendants Lowery and Cordia's motion for summary judgment and plaintiff's motion for sanctions. Plaintiff brings this action against several named defendants, including defendants named herein, for alleged violations of plaintiff's constitutional rights pursuant to 42 U.S.C. Sections 1981, 1983, 1985, 1988 and 4th, 5th, 8th and 14th Amendments. Specifically, plaintiff alleges that the defendants, while investigating the murder of a Jennings police officer in January of 1987, presented false and untrue testimony before the grand jury and further falsely and unlawfully indicted and arrested plaintiff for the murder of the officer and further caused plaintiff to be falsely incarcerated without reasonable bail.

Courts have repeatedly recognized that summary judgment is a harsh remedy that should be granted only when the moving party has established his right to judgment with such clarity as not to give rise to controversy. *New England Mut. Life Ins Co. v. Null*, 554 F.2d 896, 901 (8th Cir. 1977). Summary judgment motions, however, "can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those that really do raise genuine issues of

material fact." *Mt. Pleasant v. Associated Elec. Coop. Inc.*, 838 F.2d 268, 273 (8th Cir. 1988).

Pursuant to Fed.R.Civ.P. 56(c), a district court may grant a motion for summary judgment if all of the information before the court demonstrates that "there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law." *Poller v. Columbia Broad–casting System, Inc.*, 368 U.S. 464, 467, 82 S. Ct. 486, 7 L.Ed.2d 458 (1962). The burden is on the moving party. *Mt. Pleasant*, 838 F.2d at 273. After the moving party discharges this burden, the nonmoving party must do more than show there is some doubt as to the facts. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986). Instead, the nonmoving party bears the burden of setting forth specific facts showing that there is sufficient evidence in its favor to allow a jury to return a verdict for it. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmoving party must submit "sufficient probative evidence [that] would permit a finding in [their] favor on more than mere speculation, conjecture, or fantasy." *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 681 (9th Cir. 1985). A mere scintilla of evidence is insufficient to avoid summary judgment. *Anderson*, 477 U.S. at 252. If the evidence the nonmoving party puts forward "is merely colorable," or "is not significantly probative," the movant is entitled to summary judgment as a matter of law. *Id.* at 249–50. With these principles in mind, the Court turns to an examination of the facts.

On January 27, 1987, Sergeant Kenneth Koeller of the Jennings Police Department was shot and killed while responding to a burglary call at the Northland Shopping Center in Jennings, Missouri. Defendant Yarbrough, a Jennings police officer, also responding to the burglary call, discovered Sergeant Koeller's body. Defendant Yarbrough and fellow Jennings Police Officer

Bensing secured the scene and called for an ambulance and further assistance from the Jennings Police Department. Within minutes of his call, six (6) to ten (109) additional officers arrived. Yarbrough directed them to search the area for suspects and witnesses. Forty minutes later, Detective Steve Burnett of the St. Louis County Police Department Identification Unit arrived at the crime scene and took command of the officers at the crime scene. After Burnett took control of the crime scene, defendant Yarbrough participated in a foot search of the immediate area and later filed his report with his superiors at the Jennings Police Department.

On January 28, 1987, the St. Louis Area Major Case Squad (hereinafter "MCS") was asked by the Jennings Police Department to begin an investigation of the murder. There is some dispute about who in the Jennings Police Department requested the assistance of MCS. Defendant Slaten's affidavit states he was out of town and Colonel Orr, acting Chief of Police for Jennings, called MCS, but MCS Chairman of the Board, defendant Robert Lowery, states that defendant Slaten requested the activation of MCS. Despite the dispute over who requested the activation of MCS, it is clear that the request was made by the Jennings Police Department and defendant Lowery consulted with three members of the MCS Board of Directors and ordered the activation of MCS, which began its investigation of Koeller's death on January 28, 1987. Once the MCS was activated to investigate the murder of Sergeant Koeller, the Jennings Police Department ceased its active investigation of the shooting.

Colonel Dan Chapman of the Dellwood Police Department, MCS Commander, was assigned as Commander of the case, designated as MCS Number 141. In addition, defendant Officer Dennis Cordia of the Florissant Police Department was assigned to MCS as Report Officer for MCS Number 141.

During the fifteen (15) day investigation, officers from MCS interviewed possible witnesses and suspects at or near the scene of the crime and conducted polygraph examinations on two individuals at the St. Charles Police Department. The polygraph examinations were scheduled by defendant Cordia, but defendant Cordia did not participate in the execution or evaluation of these examinations. On February 5, 1987, following an MCS report to the St. Louis County Police Department, Lieutenant Jack Oliver of MCS applied for a warrant for plaintiff's arrest. At the request of defendant Chapman, defendant Cordia accompanied Lieutenant Jack Oliver to Chief Warrant Officer Tom DePriest's office. As acting custodian of records for the investigation of Sergeant Koeller's murder, defendant Cordia brought with him certain files for Chief Warrant Officer DePriest to review. A warrant for plaintiff's arrest was issued and plaintiff was arrested for the crime of Murder in the first degree on February 6, 1987. MCS closed investigation Number 141 on February 9, 1987.

Although MCS closed its investigation of Sergeant Koeller's murder upon the arrest of plaintiff, the Jennings Police Department resumed its supervision of the case and preceded to review the MCS's findings. The officer in charge of the Jennings Police Department's supervision of the case was Officer Hager of the Jennings Police Department. Hager was assisted by Officer Pratt, also of the Jennings Police Department. Defendant Jennings Police Chief Slaten reviewed MCS files and Jennings Police Department reports about the case. He did not authorize or direct any acts which plaintiff complains of and had no knowledge of any such acts.

On February 29, 1987, plaintiff was indicted for the crime of murder in the first degree by the Grand Jury of St. Louis County. Defendants Cordia and Lowery did not appear before the Grand Jury to testify with respect to plaintiff. On March 5, 1987,

plaintiff's application to set bail was heard before Honorable Robert McAllister, St. Louis County Circuit Judge. Defendants Cordia and Lowery did not appear before Judge McAllister to testify with respect to the setting of plaintiff's bond. Following the bail hearing, plaintiff remained incarcerated until September 5, 1987, when charges against him were dropped and he was released.

Defendant Lowery

A Section 1983 action against police supervisor officers cannot be based upon the theory of *respondeat superior. Monell v. Department of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2087, 56 L.Ed.2d 611 (1978). Moreover, "[A] section 1983 action will not lie against police supervisory officers for failure to prevent police misconduct, absent a showing of direct responsibility for the improper action". *Harris v. Pirch*, 677 F.2d 681, 685 (8th Cir. 1982) (citing *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598; *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977)). See also, *Wilson v. City of North Little Rock*, 801 F.2d 316, 322 (8th Cir. 1986) (*quoting Watson v. Interstate Fire & Casualty Co.*, 611 F.2d 120, 123 (5th Cir. 1980)). "What is required is a causal connection between the misconduct complained of and the official sued". *Pirch*, 677 F.2d at 685. To meet this burden the plaintiff must establish an "affirmative link" between defendant's action and the alleged deprivation of Constitutional rights. See *Rizzo*, 423 U.S. at 377.

The evidence submitted by plaintiff fails to establish "personal involvement" that constitutes an "affirmative link" between defendant Lowery as Chairman of The Board for the Major Case Squad and plaintiff's alleged deprivation of Constitutional rights. Plaintiff concedes that the direct personal involvement of defendant Lowery only extended as far as the activation of MCS and that he took no part in the day to day management of the MCS investigation.

As a result, plaintiff argues that defendant Lowery's failure to train, monitor, supervise or control the officers involved in the investigation caused his alleged mistreatment. In support of this charge, plaintiff alleges that defendant Lowery was deliberately indifferent to Fleming's unconstitutional treat–ment, knew or should have known of the misconduct and failed to stop the alleged mistreatment.

"A cause of action based on such a theory may be maintained only if [plaintiff] can demonstrate deliberate indifference or tacit authorization of the offensive acts by failing to take remedial steps following notice of a pattern of such acts by his subordinates". *Wilson*, 801 F.2d at 322. Affidavits submitted by defendant Lowery establish that he did not participate, supervise, organize or execute the investigation of plaintiff. Furthermore, defendant Lowery states that he was never consulted about or knew of the arrest of plaintiff until after his arrest and did not cause or direct the indictment, imprisonment or holding without bond of plaintiff.

The evidence submitted by plaintiff does not raise a material issue of fact as to defendant Lowery's stated level of participation in MCS's investigation, whether defendant Lowery was deliberately indifferent or whether defendant Lowery gave tacit approval of the alleged mistreatment. None of the evidence submitted by plaintiff indicates that defendant Lowery had knowledge of, approved of, acquiesced in or participated in the alleged misconduct of the investigating officers. Furthermore, the record does not show a pattern of previous misconduct by officers of MCS that would indicate that defendant Lowery knew or should have known about any lack of training, monitoring, supervising or control that would lead to unconstitutional acts by subordinates.

Therefore, having found no genuine issue of material fact, this Court finds that defendant Lowery is entitled to judgment as a matter of law.

Defendant Cordia

In Section 1983 actions, "Only persons who [are] directly involved in the wrongdoing may be held liable." *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977). See also, *Rizzo*, 423 U.S. at 377. "Liability may only be found if there is personal involvement of the officer being sued." *Wilson v. City of North Little Rock*, 801 F.2d 316, 322 (8th Cir. 1986) (quoting *Watson v. Interstate Fire & Casualty Co.*, 611 F.2d 120, 123 (5th Cir. 1980)). "What is required is a causal connection between the misconduct complained of and the official sued." *Pirch*, 677 F.2d at 685. To meet this burden, plaintiff must establish an "affirmative link" between the defendant's action and the alleged deprivation of Constitutional rights. See *Rizzo*, 423 U.S. at 377.

Plaintiff alleges that defendant Cordia's personal involvement in the investigation was significant enough to create an affirmative link between the alleged mistreatment of plaintiff and defendant Cordia's actions. Plaintiff avers that defendant Cordia's presence during the warrant application meeting placed a duty upon defendant Cordia, as Record Officer, to prevent the request for the warrant if Cordia believed the request was not based on probable cause. Defendant Cordia admits that, at the request of his commander, he did accompany the officer who requested plaintiff's arrest warrant and pulled files for the Warrant Officer to review. However, defendant Cordia's affidavit states that he did not present information which he knew to be false and he had no reason to suspect that information he referenced in the Squad report was false. Plaintiff has not supplied any factual evidence that suggests that defendant Cordia knew or should have known the information in the file was false or that defendant Cordia, contrary to his statement, acted in bad faith.

Plaintiff also alleges that defendant Cordia's role in scheduling polygraph tests for the MCS investigation of plaintiff estab-

lishes a sufficient causal link between defendant Cordia and the alleged mistreatment. Plaintiff's assertion is based on two letters signed by defendant Cordia that indicate he scheduled, on behalf of MCS, polygraph tests to be performed on two possible suspects. Defendant Cordia admits that he, at the request of MCS Commander Dan Chapman, did schedule the administration of these polygraph tests. However, defendant Cordia claims that he did not administer the polygraph tests, was not present at any of the examinations and did not work in any investigatory capacity during the MCS investigation.

Again, the evidence supplied by plaintiff fails to establish a material issue of fact as to the existence of an affirmative link between the constitutional deprivation alleged and defendant Cordia's personal involvement. Plaintiff has failed to show that defendant Cordia did anything more than schedule the polygraph tests of potential suspects, which is not sufficient evidence to establish an affirmative link between the alleged mistreatment of plaintiff and defendant Cordia.

Therefore, finding that there is no genuine issue as to material fact, this Court finds that defendant Cordia is entitled to summary judgment as a matter of law.

The Court further finds plaintiff's motion for sanctions to be meritless. This case was recently transferred to the under–signed from Judge Clyde S. Cahill. While pending before Judge Cahill, defendants filed a motion for summary judgment similar to the present one. Judge Cahill denied the motion because factual issues remained in dispute due to lack of adequate time to conduct discovery. Over one year has passed since Judge Cahill denied the defendants' first motion for summary judgment. The defendants have conducted additional discovery, while the plaintiff has done nothing to advance his claims. Judge Cahill's ruling on the defendants' prior summary judgment motion does not

preclude the filing of the present motion nor restrict this Court's review of the motion.

Dated this *19th* day of August, 1993.

/s/ Stephen N. Limbaugh
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV185SNL

WILLIAM FLEMING,
Plaintiff,
vs.
GREATER ST. LOUIS AREA MAJOR CASE SQUAD, ET AL.,
Defendants.

MOTION OF DEFENDANTS ROBERT LOWERY AND DENNIS CORDIA FOR SUMMARY JUDGMENT

[Filed: April 19, 1993]

Comes now defendants Robert Lowery and Dennis Cordia, and pursuant to Rule 56, F.R.C.P., move this court to enter summary judgment in favor of defendants Robert Lowery and Dennis Cordia for the reason that the pleadings and affidavits on file show that there is no genuine issue as to any material fact and that these defendants are entitled to judgment as a matter of law. For the grounds of this motion, the defendants Robert Lowery and Dennis Cordia state:

1. Plaintiff William Fleming has brought this action against Robert Lowery and Dennis Cordia claiming said officers have violated his federally protected rights under 42 U.S.C. § 1983, 1981, 1988; and the Fourth, Fifth, Eighth and Fourteenth Amendments of the United States Constitution. In Count I, Paragraphs 10–23, plaintiff claims the above listed rights were violated as a result of the defendants' actions in procuring false testimony for issuance of a warrant, causing him to be wrongfully indicted, arrested, held without bond, and imprisoned. Count Ii alleges a conspiracy on the part of defendants to do the same.

2. It is a well established principle of law that for 42 U.S.C. § 1983 liability to attach, the defendant must have been personally involved in the act or acts causing harm to the plaintiff.

3. It is a well established principle of law that for 42 U.S.C. § 1983 liability to attach, the defendants' act must be so causally related such that there exists an affirmative link between the defendants' act and the plaintiff's harm.

4. Defendants, Robert Lowery and Dennis Cordia, had no personal involvement in those acts which plaintiff claims caused him damage. At no time did defendants Cordia or Lowery procure false testimony, know of or cause issuance of a warrant based on false testimony, indict, arrest, cause plaintiff to be held without bond or cause plaintiff to be imprisoned. (See attached Affidavits of Lowery and Cordia incorporated herein by reference as defense Exhibits A and B in support of Motion for Summary Judgment.)

5. Furthermore, the limited involvement of each defendant cannot, as a matter of law, be said to have a causal connection such that there is an affirmative link between those acts and the harm suffered by plaintiff.

6. Where defendants' actions do not amount to personal involvement, nor is there a causal connection between these acts and the harm suffered, defendants, Lowery and Cordia, are entitled to judgment as a matter of law.

EVANS & DIXON
/s/Henry D. Menghini
Henry D. Menghini #17076
Kurt E. Wolfgram #43013
Attorneys for Defendants City of
Florissant, Lowery and Cordia

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this 19th day of April, 1993, to: Helton Reed, Jr., Attorney for Plaintiff, and Stephen H. Gilmore, Attorney for Plaintiff . . . .

/s/ Henry D. Menghini

DEFENDANT'S EXHIBIT A

STATE OF MISSOURI)

) SS

COUNTY OF ST. LOUIS)

AFFIDAVIT

Robert Lowery, being duly sworn, upon his oath, states:

1. I am Chief of Police for the City of Florissant and serve as Chairman of the Board of Directors of the Major Case Squad of Greater St. Louis.

2. On January 28, 1987, I received a call from Chief Harry Slaten of the Jennings Police Department. He informed me that his sergeant, Kenneth Koeller, was shot and killed while investigating a burglary at No. 22 Northland Shopping Center in Jennings, Missouri. Chief Slaten indicated that they had no witnesses, no suspects and very few leads, and was therefore requesting activa– tion of the Major Case Squad of Greater St. Louis.

3. After being apprised of this situation, I consulted with three other board members and with their approval, activated the Major Case Squad.

4. The name William Fleming and his identity was never mentioned or considered in my decision to activate the Major Case Squad.

5. Upon activation, the entire investigation was turned over to the MCS Commander, Dan Chapman. Thereafter, I took no part in the supervision, organization, or execution of the investigation.

6. My sole duty as Chairman of the Board of Directors of the Major Case Squad, was to consult with other board members

in deciding whether activation of the Squad was proper under these circumstances.

7. At no time did I interview, interrogate or otherwise speak with any witnesses or suspects in this case.

8. At no time did I direct or cause the request or issuance of a warrant for William Fleming.

9. At no time did I arrest or cause the arrest of William Fleming.

10. At no time did I cause or direct the indictment or imprisonment of William Fleming, nor did I cause or direct that he be held without bond.

11. I was never consulted, nor did I know of the arrest of William Fleming in connection with this investigation until after Mr. Fleming had been arrested.

/s/Robert Lowery

Subscribed and sworn to before me this 16th day of April, 1993.

/s/Notary Public

My commission expires: May 11, 1995

DEFENDANT'S EXHIBIT B

STATE OF MISSOURI)

) SS

COUNTY OF ST. LOUIS)

AFFIDAVIT

Dennis Cordia, being duly sworn, upon his oath, states:

1. On January 28, 1987, I was called to serve as Report Officer in Major Case Squad Investigation No. 141 activated to investigate the homicide of Sergeant Kenneth Koelier of the Jennings Police Department.

2. I am a full time employee of the City of Florissant Police Department and was on loan to the Major Case Squad for the period of its activation that time being from January 28, 1987 through February 9, 1987.

3. As Report Officer, it is my primary responsibility to maintain the Squad case file at the command post. All other duties center around this primary directive. As Report Officer, my other duties include:

a. Require each investigator to use and properly complete the forms provided for reporting.

b. Require reports in triplicate or as required. Additional copies may be made if necessary to assist the investigation staff in its duties. One copy each shall be designated to the Squad, requesting agency and the prosecutor.

c. Require investigators to submit individual reports for each lead assigned.

d. Upon termination of the Squad's participation in the investigation, prepare a general report of the findings, which is

indexed and divided according to chronology of events and categories of investigation as approved by the Board of Directors.

e. Upon successful solution of a case by the Squad, prepare an indexed prosecutive summary listing the facts of the crime, the criminal history of the defendant and the evidence to be presented and by whom.

f. Should exercise discretion in preventing disclosures possibly hampering future investigation or endangering witnesses.

g. Maintain file of case news clippings for use as required and file with the report.

h. Serve as liaison officer between the Squad Commander and the Officer in Charge relative to press releases and suggest means of using press facilities to assist the investigators.

i. Prepare information for press releases, which shall be released to the various news media only by the Squad Commander and the Officer in Charge, or their designates, who shall only release information agreed upon between the Squad Commander and the Officer in Charge.

j. Maintain the Squad case file at the Command Post.

4. On February 5, 1987, I was requested by Commander Dan Chapman to accompany him and Lieutenant Jack Oliver to the St. Louis County Prosecutor's Office to request a warrant for the arrest of William Fleming. To the meeting, I brought the Squad report.

5. At the February 5, 1987 meeting, I, at the request of my Commander, Dan Chapman, pulled documents from the MCS file for the review of Chief Warrant Officer, Tom DePriest.

6. At no time did I present information which I knew to be false. Nor did I have information causing me to suspect that information I referenced in the Squad report was false.

7. I did not appear before the Honorable Robert McAllister on March 5, 1987 to offer or endorse any testi–mony with respect to William Fleming's bail hearing.

8. I did not appear on or about February 29, 1987 to offer or endorse any testimony before the Grand Jury of St. Louis County in the matter of William Fleming.

9. At the request of Major Case Squad Commander Dan Chapman, I set up an appointment for the polygraph examination of those individuals referenced in what has been attached as Affidavit Exhibit 1.

10. I arranged for the examination of these individuals by calling Detective Miller of the St. Charles Police Department. I made this call in my role as report officer for Major Case Squad investigation 87–141.

11. I did not administer nor was I present during the examination of these individuals.

12. At no time did I have first hand knowledge of any of the facts or circumstances relating to any witness or suspect in this investigation. At no time did I work in an investigative capacity on Major Case Squad Investigation No. 141. At no time did I talk with any suspect or witness, or gather any evidence in this case. It was my sole duty as Report Officer to keep the Squad file in an organized and presentable fashion.

/s/Dennis Cordia 241

Subscribed and sworn to before me this 6th day of April, 1993.

/s/Notary Public

My commission expires: May 11, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV185SNL

WILLIAM FLEMING,
Plaintiff,
vs.
GREATER ST. LOUIS AREA MAJOR CASE SQUAD, ET AL.,
Defendants.

ORDER

[Filed: February 11, 1994]

In accordance with the memorandum filed herein this day,

IT IS HEREBY ORDERED that the defendant City of Florissant's motion for summary judgment (#61), filed September 24, 1993 be and is **GRANTED**. Judgment is entered for the defendant and against the plaintiff on the merits of the plaintiff's complaint, including both the §1983 and the §1985(3) claims. Defendant City of Florissant is hereby **DISMISSED** from this cause of action.

Dated this *11th* day of February, 1994.

/s/ Stephen N. Limbaugh
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV185SNL

WILLIAM FLEMING,
Plaintiff,
vs.
GREATER ST. LOUIS AREA MAJOR CASE SQUAD, ET AL.,
Defendants.

MEMORANDUM

[Filed: February 11, 1994]

Plaintiff has filed this action alleging violations of his constitutional rights in connection with his arrest and pre–trial incarceration for the murder of a Jennings police officer. This matter is before the Court on the defendant City of Florissant's motion for summary judgment (#61), filed September 24, 1993. Responsive pleadings have been filed.

Courts have repeatedly recognized that summary judgment is a harsh remedy that should be granted only when the moving party has established his right to judgment with such clarity as not to give rise to controversy. *New England Mut. Life Ins. Co. v. Null*, 554 F.2d 896, 901 (8th Cir. 1977). Summary judgment motions, however, "can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those that really do raise genuine issues of material fact." *Mt. Pleasant v. Associated Elec. Coop. Inc.*, 838 F.2d 268, 273 (8th Cir. 1988).

Pursuant to Fed.R.Civ.P. 56(c), a district court may grant a motion for summary judgment if all of the information before the court demonstrates that "there is no genuine issue as to

material fact and the moving party is entitled to judgment as a matter of law." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467, 82 S. Ct. 486, 7 L.Ed.2d 458 (1962). The burden is on the moving party. *Mt. Pleasant*, 838 F.2d at 273. After the moving party discharges this burden, the nonmoving party must do more than show that there is some doubt as to the facts. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986). Instead, the nonmoving party bears the burden of setting forth specific facts showing that there is sufficient evidence in its favor to allow a jury to return a verdict for it. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

In passing on a motion for summary judgment, the court must review the facts in a light most favorable to the party opposing the motion and give that party the benefit of any inferences that logically can be drawn from those facts. *Buller v. Buechler*, 706 F.2d 844, 846 (8th Cir. 1983). The court is required to resolve all conflicts of evidence in favor of the nonmoving party. *Robert Johnson Grain Co. v. Chem. Interchange Co.*, 541 F.2d 207, 210 (8th Cir. 1976).

Defendant City of Florissant (hereinafter referred to as simply "Florissant") contends that the plaintiff's claim of liability against it is one based upon a theory of *respondeat superior*, which is not cognizable under §1983. Florissant further contends that even plaintiff's vague allegation of an unconstitutional governmental practice, policy or custom is not actionable because the only two Florissant municipal officers involved in this cause of action have been dismissed. Plaintiff contends that summary judgment should be denied because Florissant was a direct participant in allegedly violating plaintiff's constitutional rights by voluntarily associating with the Major Case Squad and failing to train and supervise its officers. Plaintiff buttresses his

position by stating "[t]here is no question that Plaintiff Fleming was improperly arrested and imprisoned and there is no question that the Chief of Police of the City of Florissant set into motion the investigation which brought about that result." Plaintiff's Suggestions in Opposition to Florissant's Motion for Summary Judgment, pg. 2.

The plaintiff's position is totally meritless. Firstly, the only two Florissant municipal offers allegedly involved in violating the plaintiff's constitutional rights, Police Chief Robert Lowery and Officer Dennis Cordia, were summarily dismissed from this case on August 19, 1993. The plaintiff bases his claim against Florissant on the theories that its law enforcement officer violated the plaintiff's constitutional rights because of inadequate training and from fol– low—ing municipal custom or policy. Since the Court has deter–min–ed that the Florissant law enforcement officers did not violate the plaintiff's constitutional rights, plaintiff cannot pursue a §1983 claim against Florissant on either one of his theories. *See, City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986); *Garner Gregory, Administrator of the Estate of Joe Edwin Gregory, et al. v. City of Rogers, Ark.*, 974 F.2d 1006, 1012 (8th Cir. 1992); *Robinson v. City of St. Charles, Mo.*, 972 F.2d 974, 977 (8th Cir. 1992). Secondly, the doctrine of *respondeat superior* is inapplic–able in §1983 actions. *Givens v. Jones*, 900 F.2d 1229, 1233 (8th Cir. 1990); *Wilson v. City of Little Rock*, 801 F.2d 316, 322 (8th Cir. 1986); *Martin v. Sargent*, 780 F.2d 1334, 1338 (8th Cir. 1985). Municipalities cannot be held liable under a *respondeat superior* theory. *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

Although Florissant's summary judgment motion does not particularly address the §1985(3) claim still pending, plaintiff does refer to it in his response; thus, the Court believes it is relevant to address it now. It is this Court's considered opinion that since Florissant's agents are no longer defendants in this case, plaintiff cannot maintain a conspiracy claim against it.

42 U.S.C. §1985(3) prohibits conspiring to deprive individuals of their civil rights because of race. The elements of a cause of action for civil conspiracy under §1985 are 1) conspiracy; 2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or equal privileges and immunities under the laws; 3) an act in furtherance of the conspiracy; 4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. *Carpenters v. Scott*, 463 U.S. 825, 828–29 (1983) *citing*, *Griffin v. Breckinridge*, 403 U.S. 88 (1971). The complaint must allege specific facts "suggesting that there was a mutual understanding among the conspirators to take actions directed toward an unconstitutional end." *Duvall v. Sharp*, 905 F.2d 1188, 1189 (8th Cir. 1990). Conspiracy allegations must contain "sufficient specifity and factual support to suggest a 'meeting of the minds'". *O'Dell v. McSpadden*, 780 F.Supp. 639, 644–45 (E.D.Mo. 1991) quoting *Deck v. Leftridge*, 771 F.2d 1168, 1170 (8th Cir. 1985) (citations omitted).

In the present case, plaintiff has made only vague and conclusionary allegations about a conspiracy. He has not offered a single piece of factual evidence to support any of his conspiracy allegations. Furthermore, as a municipality, Florissant can only act through its agents. Florissant cannot carry out any acts in furtherance of a conspiracy to deprive the plaintiff of his constitutional rights if its only municipal actors have been judicially determined not to have violated the plaintiff's constitutional rights. Florissant cannot carry out any overt acts reasonably related to the promotion of the alleged conspiracy without human actors. Since its law enforcement officers have been dismissed out of this case, it is axiomatic that Florissant cannot be held liable for taking action in furtherance of a conspiracy to deprive the plaintiff of his civil rights on account of his race. Plaintiff's §1985(3) claim against defendant City of Florissant must fail.

Summary judgment will be granted for defendant City of Florissant on plaintiff's §1983 claim; as well as on the plaintiff's §1985(3) claim.

Dated this *11th* day of February, 1994.

/s/ Stephen N. Limbaugh
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV185SNL

WILLIAM FLEMING,
Plaintiff,
vs.
GREATER ST. LOUIS AREA MAJOR CASE SQUAD, ET AL.,
Defendants.

CITY OF FLORISSANT'S

MOTION FOR SUMMARY JUDGMENT

[Filed: September 13, 1993]

COMES NOW Defendant, City of Florissant, and pursuant to Rule 56, F.R.C.P., moves this Court to enter summary judgment in favor of Defendant City of Florissant for the reason that there is no genuine issue as to any material fact and that this defendant is entitled to judgment as a matter of law. For the grounds of this motion, Defendant City of Florissant states as follows:

1. Plaintiff William Fleming has brought this action against City of Florissant claiming said defendant violated his federally protected rights under 42 U.S.C. § 1983, 1981, 1988; and the Fourth, Fifth, Eighth and Fourteenth Amendments of the United States Constitution. Plaintiff's claims against City of Florissant are based on the theory of *respondeat superior*. See, Plaintiff's Complaint specifically, Paragraphs 7 and 24.

2. By order dated August 19, 1993, Defendants Lowery and Cordia's Motion for Summary Judgment was granted and said defendants dismissed from the case. See Order of Court attached as Exhibit A.

3. Where the only persons who acted on behalf of the City of Florissant have been dismissed from the lawsuit, so should the City of Florissant be dismissed.

4. Not only is there no *respondeat superior* liability, but Plaintiff states no cause of action under any other recognized theory of recovery against a municipality.[1] It is well settled that a municipality can only be held liable for § 1983 violations where the action alleged to be unconstitutional includes a policy, statement, ordinance, regulation, or decision officially adopted and promulgated by the municipality's officers. See, *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690–91 (1978). Where only municipal officers of the City of Florissant have been dismissed from the suit, there is no conduct upon which to base a suit under § 1983. Further, see Affidavit of Mayor James J. Eagan that no policy, official or otherwise, exists which condones or permits the treatment alleged by Plaintiff. (Exhibit B.)

5. A plaintiff might maintain an action where the alleged unconstitutional action occurred pursuant to govern–mental custom. *Id.* 436 U.S. at 690–691. However, Plaintiff Fleming's claim, if any, of an unconstitutional governmental custom is irrelevant where Lowery and Cordia (the only potential persons to effect the alleged custom) have been dismissed from the suit and found to be neither sufficiently personally involved nor causally related to the actions which form the basis of Plaintiff's Complaint.

6. A municipality might be sued under § 1983 if it failed to adequately train or supervise its law enforcement officials. See, *Canton v. Harris*, 489 U.S. 378 (1989). However, where defen–

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[1] Although Plaintiff's claim against the City of Florissant appears to be based solely on the theory of *respondeat superior*, there are vague references in the Complaint to unconstitutional customs or policies.

dants Lowery and Cordia's actions did not constitute personal involvement having an affirmative link with Plaintiff Fleming's alleged deprivation of constitutional rights; and where the affidavits of Lowery and Cordia, previously submitted, show they took no part in the day–to–day management of the investigation, there is no action or person upon which to base liability against the City of Florissant and therefore, any claims based on training or super– vision must be denied.

7. For the City of Florissant to have *respondeat superior* liability, there must be actionable conduct to serve as the basis for the City's liability. Where Defendants Lowery and Cordia have been dismissed from the lawsuit, there is no one upon which to base the liability claims against the City of Florissant, and Defendant City of Florissant should be dismissed.

WHEREFORE, Defendant City of Florissant prays this Court enter a judgment finding no genuine issue of material fact exists and that the City of Florissant is entitled to summary judgment as a matter of law.

EVANS & DIXON
/s/ Kurt E. Wolfgram
Henry D. Menghini #17076
Kurt E. Wolfgram #43013
Attorneys for Defendants City of Florissant, Lowery and Cordia

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this 13th day of September, 1993, to: Helton Reed, Jr., Attorney for Plaintiff, and Stephen H. Gilmore, Attorney for Plaintiff . . . .

/s/ Kurt E. Wolfgram

DEFENDANT'S EXHIBIT B

STATE OF MISSOURI)
) SS
COUNTY OF ST. LOUIS)

AFFIDAVIT OF MAYOR JAMES J. EAGAN

I, James J. Eagan, having been duly sworn upon my oath state as follows:

1. I am the Mayor of the City of Florissant and was Mayor at the time of the incidents alleged in the complaint of plaintiff, William Fleming.

2. I have knowledge of the organization of the various departments of the City of Florissant.

3. The Police Department is one of the departments in the City of Florissant. Members of the Police Department do not have authority to establish the official policy of the City of Florissant with respect to the matters alleged in the petition filed by plaintiff.

4. The Mayor and Council decide any policy questions. The City has no written or unwritten policy statement, ordinance, regulator or practice authorizing or permitting the kind of activity described in the petition filed by plaintiff, William Fleming, including the alleged arrest without cause, the procuring of false testimony, or any other associated mistreatment of the plaintiff as detailed in the complaint.

5. The City does not now and has not in the past ever knowingly permitted any such acts to be performed by its Police Department.

6. The only Police Officer of the City of Florissant who worked on the Major Case Squad Investigation No. 141 was Dennis Cordia, who acted only as a Report Officer. Colonel Lowery had no involvement other than to vote with officers from other municipalities in activating the Major Case Squad.

/s/Mayor James J. Eagan

Subscribed and sworn to before me this 31st day of August, 1993.

/s/Notary Public

My commission expires: April 6, 1997.